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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 134.

UNITED STATES OF AMERICA, APPELLANT,

VS.

JAY G. WILLIAMS, CHARLES R. FORD, JOHN S. BOMBACI, AND ANDREW J. YUHAS, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR THE APPELLEES.

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OPINION BELOW.

The District Court rendered no formal opinion. Its order dismissing the indictment, which discloses the grounds of its decision, appears at R. 43-44.

JURISDICTION.

The order of the District Court dismissing the indictment was entered on March 28, 1950 (R. 43-44), and the Government's motion to vacate the order of dismissal and for rehearing (R. 45-49) was denied on April 12, 1950 (R. 49-50). The United States filed its notice of appeal to this Court on May 11, 1950 (R. 50). Probable jurisdiction was noted by this Court on October 16, 1950 (R. 53). The jurisdiction of this Court to review on direct appeal the judgment of the District Court sustaining, prior to the attachment of jeopardy, the defendants' pleas in bar to the indictment is conferred by 18 U. S. C. 3731.

QUESTIONS PRESENTED.

1. Does false testimony given in the course of a trial on an indictment which does not charge a crime and is void constitute perjury?

2. Does Williams' conviction upon a criminal charge bar a subsequent prosecution for perjury with reference to Williams' testimony as to the act constituting the basis for such criminal charge, i. e., assault and battery, where such act is necessarily determinative of the issue?

3. Does Yuhas' acquittal upon a criminal charge bar a subsequent prosecution for perjury with reference to his testimony as to an act constituting the basis of such criminal charge and necessarily determinative of the issue?

STATUTE INVOLVED.

18 U. S. C. 1621 provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in

which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT.

The appellees accept the statement made in the Government's brief, page 3, with the addition of the following.

The substantive offenses of which Williams was convicted under Section 20 of the Criminal Code charged him with beating and torturing each of the complaining four witnesses (R. 30-42) in the even numbered counts of the indictment respectively. Williams testified he did not commit such assault and battery at his trial Case No. 365 herein. The indictment for perjury (R. 1-21) alleges Williams falsely testified as to each of said complaining witnesses that he had not:

> "* * * in said building or shack aforesaid, struck, bruised, battered, beaten, assaulted or tortured * * *."

said complaining witnesses.

A motion to dismiss the perjury indictment was filed by Williams. It alleged (R. 24-25):

> "* * * and that the said fact or facts so testified to by this defendant in his own behalf and denial of said assault and battery as aforesaid, was the act

charged in said criminal case No. 7279-M-Criminal and this fact was necessarily determinative of the issue—and this defendant alleges his conviction under counts numbered 2-4-6 and 8 of said indictment numbered 7279-M-Criminal bars a prosecution for perjury in the instant case."

The trial court sustained the motion to dismiss by Williams.

Yuhas was not charged as a principal, but as an aider and abettor in the beating of the complaining witnesses, on which counts Williams was convicted and Yuhas acquitted.

SUMMARY OF ARGUMENT.

I.

False testimony given in the course of a trial upon a void indictment which fails to charge any crime against the United States is not perjury.

This contention is supported by the great weight of authority and is based upon the theory that, where the court has no jurisdiction to try the alleged offenders, it is not a competent tribunal and no statement made in the course of such proceedings would be material. See *Paine's Case*, Yelv. 111, 80 Eng. Rep. 76 (1792); *McClannahan* v. *Commonwealth*, 10 Ky. Ops. 72; *Rex* v. *Cohen*, 1 Stark 511, 171 Eng. Rep. 546; *United States* v. *Jackson*, 20 D. C. 424, 82 A. L. R. 1129; *West* v. *United States*, 258 Fed. 413, 416-417; 41 Am. Jur. 14, Perjury, Sec. 23.

II.

The trial judge properly entered an order sustaining the motion to dismiss as to Williams but misconceived the

grounds stated in the order of dismissal as being founded on the theory of former jeopardy.

The Government contends (Brief 14) that the prosecution of Williams for perjury in denying at his trial that he beat and tortured the alleged victims does not constitute double jeopardy. The writer is in accord with this contention, which however is not the issue involved by the granting of Williams' motion to dismiss.

The true legal issue presented by the order of dismissal as to Williams is:

> DEFENDANT'S CONVICTION UPON A CRIMINAL CHARGE BARS A SUBSEQUENT PROSECUTION FOR PERJURY WITH REFERENCE TO DEFENDANT'S TESTIMONY AS TO THE ACT CONSTITUTING THE BASIS FOR SUCH CRIMINAL CHARGE WHICH ACT IS NECESSARILY DETERMINATIVE OF THE ISSUE.

III.

Yuhas, having been acquitted of aiding and abetting Williams in the beatings, the Government is estopped from again trying this case and attempting to prove that Yuhas saw the beatings, that fact having already been determined by a former jury.

ARGUMENT.

I.

False testimony given in the course of a trial on a void indictment which does not charge a crime and which the court is therefore without jurisdiction to try is not perjury.

The Court of Appeals for the Fifth Circuit in *Williams v. United States*, 179 F. 2d 644, pending on writ of certiorari, No. 26, granted October 16, 1950, held that the conspiracy indictment which superseded the four conspiracy counts of the earlier indictment was bad and ordered it quashed.

The fault found with the indictment was not that it failed because of some technical error to state a crime, but that it failed in a very material respect. It charged violation of Section 19, Criminal Code, in that the defendants had conspired to deprive certain citizens of rights secured by the Fourteenth Amendment to the Constitution. The Court held that Section 19 does not embrace such an alleged offense.

The indictment was void, not voidable. Under the facts of the case no valid indictment for conspiracy could be found.

It is true that four other counts of the indictment upon which the trial defendants were first tried were held to be good and the indictment in the instant case charges in separate counts that perjury was committed as to those counts but the trial was had upon both the good and bad counts of the indictment and testimony was given as to both without distinction. In any event, this appeal

is not concerned with them since the question is not raised by the District Court's order.

It must be borne in mind that 18 U. S. C. 1621 provides, "Whoever, having taken an oath before a *competent* tribunal * * *" (Emphasis added).

A court which is wholly without jurisdiction is not a competent tribunal.

A Federal District Court has no criminal jurisdiction to try matters which are not crimes against the United States.

Paine's Case, Yelv. 111, 80 Eng. Rep. 76 (1792):

> *Nota*: per Williams, Justice, that it was resolved by all the Justices of England in the Star-Chamber in the case of one Paine of Middlesex, who was sued there for perjury in the Court of Requests on his deposition in a case there depending, where the conveyance and title of land and freehold come in question, that this perjury was not punishable; for it is but a vain and idle oath, and not a corrupt oath, because the Court of Requests have nothing to do with, nor can examine titles of land, which are real, and are to be discussed and determined in the King's Courts."

Suppose that these defendants had been indicted under Section 19 for conspiracy in that they combined and agreed, while playing football, to rush through tackle and knock the tackle flying, thus depriving him of his right not to be disturbed in his person.

True, the District Court has jurisdiction to try offenses laid under Section 19, but they must be *offenses* and against the United States.

Or, suppose that members of the Florida Milk Control Board are indicted under Section 19 in that they

conspired while acting under color of state law to raise the price of milk, thereby depriving children of impoverished citizens of the right to have milk.

It is doubtful that any one would consider this a crime against the United States and a trial upon such an indictment would be a nullity, but no more so than the trial in the instant case, which does not charge any offense against the United States.

The general rule, stated in 41 Am. Jur. 14, Perjury, Sec. 23, is that:

> "In order to constitute perjury, the false statement must be made in a proceeding, or in relation to matter, within the jurisdiction of the tribunal or officer before whom the proceeding is held, or by whom the matter is considered. Accordingly, it is well settled that an indictment for perjury will not lie against a witness for false swearing on the trial of a void judicial proceeding. However, when there is a defect which renders the proceeding voidable only, and such proceeding is amendable, or when the defects are waived by the parties and the cause is heard on the merits, perjury may be charged * * *."

Authorities supporting this statement are collected in an exhaustive annotation in 82 A. L. R. 1127, to which the Court's attention is invited.

The annotator there states, page 1128:

> "It is a well-established general rule that perjury cannot be charged on a false oath in a proceeding before a court which had no jurisdiction to inquire into the matter which was the subject of that proceeding."

In *McClannahan* v. *Commonwealth*, 10 Ky. Ops. 72, it was said, page 73:

"The administration of an oath in a case over which the court has no jurisdiction is, like every other part of the proceeding, a mere nullity, the judge having no more power to administer it than he would on the street where no purpose was to be accomplished by it, nor any oath required."

In *Rex v. Cohen*, 1 Stark 511, 171 Eng. Rep. 546, the Court said:

"* * * since the oath was taken in an unauthorized cause, I cannot say that the swearing amounts to perjury, however I may regret it * * *."

The Court in *Collins v. State*, 78 Ala. 433, 435, said:

"No oath taken before an officer administering justice under color of authority, which is in fact unwarranted and void, can, though false, amount to perjury."

The following account of the case, *United States* v. *Jackson*, 20 D. C. 424 (not available to briefer), is found in 82 A. L. R. 1129:

"* * * an indictment for perjury alleged to have been committed on a trial for receiving stolen goods, the court said: 'We think it is very well settled, the authorities seeming to be uniform upon that point, that when perjury is assigned to have been committed in the course of a trial in any court, that the court in which the trial is held, where the perjury is alleged to have been committed, must have had jurisdiction of the action or prosecution in which the oath was taken, and that unless the court had jurisdiction to try and dispose of the case, perjury cannot be assigned. We therefore hold that it was essential that the police court should have had jurisdiction to try the case without a jury at the time the oath was administered to the defendant, and, not having that jurisdiction, and the oath having been administered upon a trial by the court, perjury cannot be assigned

upon any alleged false statement which she may have made in giving her testimony in the case.' "

West v. *United States*, 258 Fed. 413, 416-417, cited by the Government, page 22, points up the distinction between a proceeding in which the court has no jurisdiction and a proceeding in which the court has jurisdiction to proceed in the first instance but loses such jurisdiction when facts showing lack of jurisdiction appear.

We are confronted with no such case here. If the indictment fails to charge a crime the court is without jurisdiction to hear the matter at all.

II.

The assault and battery of the complaining witnesses, denied by Williams in his testimony under his plea of not guilty, was not testimony concerning a collateral matter material to the case but was the act constituting the entire basis of the substantive crime charged—and this fact (acts of assault and battery) was necessarily determinative of the issue. The cases supporting the contention of Williams, represent the majority rule of the Federal Courts, viz.:

Ehrlich v. *United States*, 5 Cir., 145 F. 2d 693.
United States v. *Angelo*, 3 Cir., 138 F. 2d 466.
United States v. *Butler*, D. C., 38 Fed. 498.
Chitwood v. *United States*, 8 Cir., 178 Fed. 442.
Allen v. *United States*, 4 Cir., 194 Fed. 664.
Youngblood v. *United States*, 7 Cir., 266 Fed. 795.
Kuskulis v. *United States*, 10 Cir., 37 Fed. 241.

III.

In the instant perjury case, it is Yuhas' contention that whether he did or did not see Williams beat the complaining witnesses was a fact necessarily determinative of

whether he aided or abetted Williams in the commission of the substantive act. This was not a collateral matter, but one directly in issue. The testimony at the trial (case No. 365 of this Court, *Williams* v. *United States*) was received in evidence in support of the various motions of the defendants to dismiss the perjury indictment (R. 27). This testimony discloses that no one ever gave any instructions to Williams to beat the complaining witnesses, that such action originated with Williams himself, and it was only after Williams commenced such assault and battery could the theory of aiding and abetting be applied. Certainly from the testimony in both of the trials (cases No. 365 and No. 26 of this Court) Yuhas never was an accessory before the fact under the term "aiding and abetting" nor does the indictment even attempt so to allege.

The additional argument advanced by the defendant Williams we therefore believe is applicable to Yuahs: Yuhas' acquittal bars a subsequent prosecution for perjury with reference to his testimony as to a fact constituting the basis for the charge of aiding and abetting in the commission of the substantive charge of assault and battery and which fact was necessarily determinative of the issue.

A similar situation was before the Court in *United States* v. *De Angelo*, 138 F. 2d 466. There the Court said:

> "The conclusiveness of a fact which has been completely adjudicated by a criminal trial is not confined to such matter only as is sufficient to support a plea of double jeopardy. Even though there has been no former acquittal of the particular offense on trial, a prior judgment on related matters has been said to be deemed conclusive as to all that the judgment determined. Cf. *U. S.* v. *Adams*, 281 U. S. 202, 205, 50 S. Ct. 269, 74 L. Ed. 807. The matter is one of collateral estoppel of the prosecution. Nor can there be any requirement of mutuality with respect

to a criminal judgment's conclusiveness. An accused is constitutionally entitled to a trial *de novo* of the facts alleged and offered in support of each offense charged against him and to a jury's independent finding in respect thereto. But a 'rule of evidence' has been recognized which accords to the accused the right to claim finality with respect to a fact or group of facts previously determined in his favor upon a previous trial. See *U. S. v. Carlisi*, D. C. E. D. N. Y., 32 Fed. Supp. 479, 482.

The pertinency of the foregoing rule depends upon what facts the verdict of acquittal in the former criminal trial served to conclude and whether the facts so determined are again put in issue by the government's allegations and proofs at a subsequent trial of the same defendant for another criminal offense * * *.

Among the facts so litigated and submitted for the jury's determination at the trial for the robbery were the question as to whether De Angelo was present at and had participated in the robbery as the driver of the car used in the perpetration of the robbery. The jury, by its verdict of acquittal as to De Angelo, determined those issues adversely to the government's allegations. They should not therefore have been gone into again at the trial of the conspiracy indictment.

In order to try Yuhas for perjury, it will be necessary to relitigate the very matters in issue at the former trial and which the jury has already determined as being in issue. This the government is estopped from doing.

CONCLUSION.

For the reasons herein expressed, we respectfully submit that the order of the District Judge be affirmed.

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